REMARKS

Claims 34-63 were presented for examination and claims 34-63 stand rejected. Claims 34-63 are pending in this application, of which claims 34 and 49 are independent. Applicants submit that pending claims 34-63 are patentable and in condition for allowance.

The following comments address all stated grounds of rejection. Applicants respectfully traverse all stated rejections and urge the Examiner to pass the claims to allowance in view of the remarks set forth below.

CLAIM REJECTIONS UNDER 35 U.S.C. §101

Claims 49-63 are rejected under 35 U.S.C. §101 for being directed towards non-statutory subject matter. Claim 49 is an independent claim. Claims 50-63 depend on and incorporate all the patentable subject matter of independent claim 49. Applicants respectfully traverse this rejection and submit that claims 49-63 are directed towards statutory subject matter.

Claims 49-63 recite a system having an interface unit for managing throughput while avoiding overload of one or more servers, the interface unit intercepting requests from clients to a server, transmitting the intercepted requests to the server, and intercepting responses to the requests transmitted by the server to the clients. The subject matter of such a system clearly falls within at least one of the four categories of statutory subject matter deemed patentable. However, the Examiner argues that the claimed invention may include software-only embodiments of the interface unit and therefore somehow it is no longer statutory subject matter. Applicants respectfully disagree with

Examiner and contend that even in cases of software embodiments of the interface unit, the claimed subject matter still classifies as statutory subject matter.

A software embodiment of the interface unit comprises functional descriptive material of executable instructions (e.g., computer program/data structures) which impart functionality when employed on a computing device. Such embodiments are statutory subject matter. Applicants respectfully direct the Examiner's attention to MPEP 2106.01, which states that descriptive material can be characterized as either "functional descriptive material" or "nonfunctional descriptive material." In this context, "functional descriptive material" consists of data structures and computer programs which impart functionality when employed as a computer component. When functional descriptive materials, such as software, becomes structurally and functionally interrelated to a computer readable medium, such as a computing device, the use of technology permits the function of the descriptive material to be realized and will be statutory in most cases. In a software embodiment of the interface unit, the interface unit is intercepting requests and responses and transmitting intercepted requests between devices. In order to perform this functionality, the functionality provided by the executable instructions of the software of the interface unit would be imparted because of execution on a machine, such as a computing device. Therefore, even for a software embodiment of the interface unit, the claims maintain their status as statutory subject matter.

For at least the above-stated reasons, Applicants submit that claims 49-63 recite statutory subject matter. Applicants respectfully request the Examiner to reconsider and withdraw the rejection of claim 49-63 under 35 U.S.C. §101.

CLAIM REJECTIONS UNDER 35 U.S.C. §103

I. Claims Rejected Under 35 U.S.C. §103

Claims 34-63 are rejected under 35 U.S.C. §103 as unpatentable over U.S. Patent No. 6,360,270 to Cherkasova et al. ("Cherkasova") in view of U.S. Patent No. 7,024,477 to Allan ("Allan"), and further in view of U.S. Patent No. 7,000,012 to Moore et al. ("Moore"). Claims 34 and 49 are independent claims. Claims 35-48 depend on and incorporate all the patentable subject matter of independent claim 34. Claims 50-63 depend on and incorporate all the patentable subject matter of independent claim 49. Applicants respectfully traverse this rejection and submit that Cherkasova, Allan and Moore, alone or in combination, fail to teach or suggest each and every element recited in claims 34-63.

A. Independent Claims 34 and 49 Patentable over Cherkasova, Allan and Moore

To establish obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. Independent claims 34 and 49 are directed towards a method and system for managing throughput of a server while avoiding overload of the server. These independent claims recite monitoring changes in response times from the server and changes of a rate in which the response times from the server change. Applicants submit that neither Cherkasova, Allan nor Moore, alone or in combination, disclose, teach or suggest each and every element of the claimed invention.

Cherkasova, Allan and Moore fail to teach or suggest monitoring changes in response times from the server and changes of a rate in which the response times from the server change. The Examiner admits that Cherkasova does not teach this element of the

claimed invention. The Examiner cites Moore for this purpose and Allan for another purpose. However, Moore and Allan also do not teach or suggest this claim limitation. The Examiner equates Moore's sensing that the response time on a network link is increasing substantially as monitoring changes of a rate in which the response time change in the claimed invention. But, Moore only describes a first rate of change of response times – that is, just a change in rate. The claimed invention monitors both the changes in response time and changes of rate in which the response times change. Moore does not describe any second order rate of change to monitor the changes to the changes in rate. Since Examiner merely cited Allan for the purpose of suggesting Allan teaches monitoring service performance of the server exceeding a predetermined threshold, Allan also does not teach or suggest monitoring any changes to the changes in rate as in the claimed invention. Thus, neither Moore nor Allan nor Cherkasova teach or suggest monitoring changes in response times from the server and changes of a rate in which the response times from the server change.

Because Cherkasova, Allan and Moore, alone or in combination, fail to disclose, teach or suggest each and every element of the claimed invention, Applicants submit that independent claims 34 and 49 are patentable and in condition for allowance. Claims 35-39 and 45-48 depend on and incorporate all the patentable subject matter of independent claim 34. Claims 50-54 and 60-63 depend on and incorporate all the patentable subject matter of independent claim 49. Therefore, Applicants submit that claims 35-39, 45-48, 50-54 and 60-63 are also patentable and in condition for allowance. Thus, Applicants request the Examiner to withdraw the rejection of claims 34-63 under 35 U.S.C. §103.

B. Claims 40-44 and 55-59 Patentable over Cherkasova, Allan, Moore, Phaal and Shabtay

Claims 40-41, 55-56 are rejected by the Examiner as unpatentable over Cherkasova in view of Allan in further view of U.S. Patent No. 6,055,564 to Phaal ("Phaal"). Claims 40-41, depend on and incorporate all the patentable subject matter of independent claim 34. Claims 55-56 depend on and incorporate all the patentable subject matter of independent claim 49. For the reasons discussed above, Applicants submit independent claim 49 is patentable and in condition for allowance. Phaal does not detract from the patentability of independent claim 49. As with Cherkasova and Allan, Phaal also fails to disclose, teach or suggest monitoring changes in response times from the server and changes of a rate in which the response times from the server change. Instead, Phaal is concerned with determining the position of the client request in the queue based on the preferred client value (See Phaal, col. 8, line 66 to col. 9, line 50). Since Phaal in combination with Cherkasova and Allan fails to teach or suggest each and every element of the claimed invention, Applicants submit claims 40-41 and 55-56 are patentable and in condition for allowance. Thus, Applicants request the Examiner to withdraw the rejection of claims 40-41 and 55-56 under 35 U.S.C. §103.

Claims 42-44 and 57-59 are rejected under 35 U.S.C. §103 as unpatentable over Cherkasova in view of Allan in further view of U.S. Published Application No. US 2002/0120743 to Shabtay et al. ("Shabtay"). Claims 42-44 depend on and incorporate all the patentable subject matter of independent claim 34. Claims 57-59 depend on and incorporate all the patentable subject matter of independent claim 49. For the reasons discussed above, Applicants submit independent claim 49 is patentable and in condition

for allowance. Shabtay does not detract from the patentability of independent claim 49. As with Cherkasova and Allan, Shabtay fails to disclose, teach or suggest monitoring changes in response times from the server and changes of a rate in which the response times from the server change. Instead, Shabtay is concerned with pooling connections and multiplexing client requests via the pooled connections. (See Shabtay, par. [0047]). Since Shabtay combined with Cherkasova and Allan fails to teach or suggest each and every element of the claimed invention, Applicants submit claims 42-44 and 57-59 are patentable and in condition for allowance. Thus, Applicants request the Examiner to withdraw the rejection of claims 42-44 and 57-59 under 35 U.S.C. §103.

CONCLUSION

In light of the aforementioned arguments, Applicants contend that each of the Examiner's rejections has been adequately addressed and all of the pending claims are in condition for allowance. Accordingly, Applicants respectfully request reconsideration, withdrawal of all grounds of rejection, and allowance of all of the pending claims.

Should the Examiner feel that a telephone conference with Applicants' attorney would expedite prosecution of this application, the Examiner is urged to contact the Applicants' attorney at the telephone number identified below.

Respectfully submitted,

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Dated: August 28, 2008

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